88-1141

No.

Supreme Court, U.S.
FILED
DEC 27 1988

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DEMOCRATIC CENTRAL COMMITTEE
OF THE DISTRICT OF COLUMBIA, et al.,

Petitioner,

v.

D.C. TRANSIT SYSTEM, INC.

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CROSS PETITION FOR CERTIORARI

On behalf of respondents, The Democratic Central Committee of the District of Columbia, Tilford E. Dudley, Bruce Terris, The Emergency Committee on the Transportation Crisis, Sammie A. Abbott, The Metropolitan Citizens Advisory Council, Thomas E. Payne, Lawrence Aaronson, Marion Barry, Jr., Linwood D. Chatman, Margaret M. Clarke, Matthew K. Clarke, Joseph Gipson, Lillian Green, Ralph Petie Green, Willie J. Hardy, Dorothy Harrison, Hubert W. Leckie, Lester McKinnie, Mrs. Robert Nash, Bernard W. Prior, Mary Ray, Frank Speltz, George E. Storey, Chauncey Thomas, William A. Wnedt, Johnie Wilson, Clarence Wolrich, Maria Worris, and Mrs. Phillip Young.

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December 23, 1988

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The petition of D.C. Transit System, Inc. for certiorari was filed December 13, 1988 and received by counsel for respondents Democratic Central Committee, et al. on December 16, 1988.

QUESTIONS PRESENTED

Whether, proceeding upon false due process and just compensation premises, *DCC III* improperly denied farepayers (a) credit for the income tax component of fare excessiveness charged against them and (b) interest on the value appreciation from the date the identified properties were removed from public service.

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No. 88-979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CROSS PETITION FOR CERTIORARI

Respondents, The Democratic Central Committee of the District of Columbia, Tilford E. Dudley, Bruce Terris, The Emergency Committee on the Transportation Crisis, Sammie A. Abbott, The Metropolitan Citizens Advisory Council, Thomas E. Payne, Lawrence Aaronson, Marion Barry, Jr., Linwood D. Chatman, Margaret M. Clarke, Matthew K. Clarke, Joseph Gipson, Lillian Green, Ralph Petie Green, Willie J. Hardy, Dorothy Harrison, Hubert W. Leckie, Lester McKinnie, Mrs. Robert Nash, Bernard W. Prior, Mary Ray, Frank Speltz, George E. Storey, Chauncey Thomas, William A. Wendt, Johnie Wilson, Clarence Wolrich, Maria Worris, and Mrs. Phillip Young respectfully pray that should a writ of certiorari issue to review the judgment and mandate of the United States Court of Appeals for the District of Columbia Circuit in the above captioned matter that this cross-petition be granted also to review the issues raised herein.

OPINIONS BELOW

Petitioner's identification of the opinions below is incomplete and misleading. Omitted are two earlier opinions in this case, *Democratic Central Committee* v. *WMATC*, 158 U.S. App. D.C. 7, 485 F.2d 796 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC I"*), and *Democratic Central Committee* v. *WMATC*, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC II"*). These cases are the prior merits decisions. The present case, *Democratic Central Committee* v. *WMATC*, 842 F.2d 402 (D.C. Cir. 1988) ("DCC III"), is the decision upon remand for the sole purpose of assessing damages pursuant to the rulings in *DCC I* and *DCC II*.

To cite and provide a fat appendix of detailed and largely irrelevant proceedings on remand of the two 1973 cases, *DCC I* and *DCC II*, without citing those cases is, at best, an incomplete compliance with Rule 21.1 (d). The same might also be said of the failure to include in the appendix two companion cases consolidated for argument below and extensively cross-referenced herein: *Bebchick* v. *WMATC*, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973) (*"Bebchick II"*), and *Bebchick* v. *WMATC*, 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981) (*"Bebchick III"*). But petitioner's violation of Rule 21.1(k)(ii) goes beyond that: petitioner reproduces in its appendix Transit Commission Orders 773 and 1052 without including the opinions in this case by the D.C. Circuit holding those orders illegal. Furthermore, petitioner sets forth orders 882, 900 and 984 without including the petitions for rehearing challenging them by reference to the then pending appeal from Order 773 which was eventually sustained in *DCC I*. These omitted applications are directly relevant to petitioner's first ground for granting the writ: that "rate orders issued between Order 773 and Order No. 1052 (i.e. Nos. 882, 900 and 984) were *never* challenged" (petition, p. 17, emphasis in the original).

Finally, it should be noticed that the slip opinion in *DCC III* reproduced in Transit's appendix is exceedingly inaccurate, having been amended several times after its issuance, as stated in the West reprint.

STATEMENT OF THE CASE

In the 1960's D.C. Transit completed its conversion from streetcar to buses. As a consequence, a good deal of real property formerly used in streetcar operations was obsoleted for that purpose and removed from public service. In 1967 rate hearings, the Democratic Central Committee of the District of Columbia,[1] joined by a large number of community organizations and civic leaders, raised the issue of farepayer's entitlement to in-service appreciation of those real properties removed from operating status, the farepayers having previously borne the cost of conversion and the risk of a decline in value. Commission Order No. 773 of January 26, 1968 declined to give recognition to the public's interest in such "transferred properties," that is, "transferred" out of the owner corporation's regulated utility account into its private unregulated investment portfolio.

The farepayer's entitlement to in-service appreciation of property removed from operating status was raised not only in the 1967 proceedings leading to the January 1968 fare increase but also in all subsequent proceedings wherein rate increase orders were issued.[2]

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[1] Now "The District of Columbia Democratic State Committee." To avoid confusion the former name is used throughout this brief.

[2] Orders 880 and 882 of October 18 and 29, 1968, were "interim" orders promulgated without "full and complete findings...that must accompany an exercise of...authority to prescribe permanent rates." Democratic Central Committee v. *WMATC*, No. 22, 450, 158 U.S. App. D.C. 68, 74, 485 F.2d 886, 892 (1973) quoting from Payne v. WMATC, 134 U.S. App. D.C. 321, 327, 415 F.2d 901, 907 (1968). The record and briefs in No. 22, 450, decided the same day as *DCC I* and *II*, show that these petitioners incorporated by reference their previous transferred properties arguments and objections to Order 773 in their objections to Orders 880 and 882. But the issues were not reached. Although both the Commission and the Court recognized that "it was probable that Transit's bus riders were entitled to refunds," 158 U.S. App. D.C. at 75, 485 F.2d at 893, the interim orders, recognized as based on incomplete hearings, were upheld in the emergent circumstances shown. Interim Orders 894, 895, 896, 900, 903, and 963 of December 13, 1968 through July 14, 1969, continuing with minor adjustment the same level of fares as Orders 880 and 882, were reviewed in Yohalem v. WMATC, 141 U.S. App. D.C. 17, 436 F.2d 171 (1970). There the suggestion was made that D.C. Transit "liquidate certain of its assets which were not used in connection with its Transit operations." 141 U.S. App. D.C. at 27, 436 F.2d at 181. Despite temporary stays in Black United Front and Democratic Central Committee v. WMATC, 141 U.S. App.

In 1969 the "transferred properties" issue was raised, in slightly variant form, upon remand of *Williams* v. *WMATC*, 134 U.S. App. D.C. 342, 415 F.2d 922, *cert. denied*, 393 U.S. 1081 (1969).*Cf. Bebchick* v. *Public Utilities Commission*, 115 U.S. App. D.C. 216, 318 F.2d 187 *(en banc), cert. denied.* 373 U.S. 913 (1963). The Commission was urged to consider as an offset to a $1,058,856 "depreciation deficiency" charged against the Riders' Fund the appreciation in value of six of Transit's real properties that had been removed from public service. The Commission declined in its 1969 Order 981, just as in its previous 1968 Order 773, to credit farepayers with appreciation of properties retired from service.

In 1970, the Democratic Central Committee and its allied community organizations and civic leaders again raised the "transferred properties" issue in Transit rate proceedings of that year which eventuated in Commission Order No. 1052 wherein the public was again denied credit for appreciation of D.C. Transit's retired properties.

These successive 1968, 1969, and 1970 Commission rulings against the farepayers' right to a credit for appreciation of removed properties were all timely appealed to the D.C. Circuit.

On June 28, 1973 the D.C. Circuit reversed all of the 1968, 1969, and 1970 transferred properties rulings and remanded the appealed cases thereon for further proceedings to determine the precise amount due farepayers: *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, No. 21, 865, 158 U.S. App. D.C. 7, 485 F.2d 786 (1973) *cert. denied*, 415 U.S. 935 (1974) (*"DCC I"*); *Bebchick* v. *Washington Metropolitan Area Transit Commission*, No. 23, 720, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973)

D.C. 73, 436 F.2d 227 (1970), vacated, Democratic Central Committee v. WMATC, 141 U.S. App. D.C. 79, 436 F.2d. 233 (1970), the D.C. Circuit in the interim order cases cited generally sustained the Commission's power, under the emergency conditions shown, to award fare increases without awaiting determination of farepayer restitution issues. Postponement of such an adjudication was upheld even in the face of a receivership petition. Democratic Central Committee v. D.C. Transit System, Inc., 148 U.S. App. D.C. 154, 459 F.2d 1178 (1972). The transferred properties issue was again incorporated by reference in objections to Order No. 984 of October 24, 1969, but before an appeal could be perfected, new rates reviewed in *DCC II*, went into effect and remained in effect until Transit ceased operations on January 14, 1973.

(*"Bebchick II"*); and *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, No. 24, 398, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC II"*).[3]

This Court denied certiorari in the two *DCC* cases on February 19, 1974 (No. 73-971). After completion of remand proceedings before the Commission,[4] the D.C. Circuit first entered its review decision in the companion case of *Bebchick* v. *WMATC ("Bebchick III")* 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981); *Bebchick* v. *WMATC ("Bebchick IV")* 256 U.S. App. D.C. 296, 805 F.2d. 396 (1986); and later in the present case, *Democratic Central Committee* v. *WMATC ("DCC III")*, 842 F.2d 402 (D.C. Cir. 1988). Petitions for rehearing and rehearing *en banc in DCC III* were denied September 14, 1988.

REASONS FOR GRANTING THE WRIT ON CROSS PETITION

Proceeding upon false due process and just compensation premises urged upon the Court by Transit, *DCC III* denied farepayers (a) credit for the income tax component of fare excessiveness charged against them in Orders 773 through 1052 and (b) interest on the value appreciation from the date the identified properties were removed from public service.[5]

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[3] The "transferred properties" claims presented by the Black United Front in petition No. 24, 428 were dismissed by the D.C. Circuit for want of jurisdiction because BUF failed to raise the issue in proceedings before the Commission. *DCC II*, 158 U.S. App. D.C. at 116-117, 485 F.2d at 895-896, held that only DCC's petition, No. 24, 398, "preserved the point for judicial review." BUF nevertheless participated in the remand and subsequent appellate proceedings on the properties issue. Order 773 was sustained apart from those issues remanded in *DCCI*, Powell v. WMATC, 158 U.S. App. D.C. 301, 485 F.2d 1080 (1973).

[4] Issues involving other than "transferred properties" were also remanded, but those issues are not involved in the instant petition nor were they involved in the 1973 petition, No. 73-971.

[5] Both of these issues were dealt with tangentally in Bebchick v. WMATC (Bebchick III), 207 U.S. App. D.C. 161, 166-169, 645 F.2d 1086, 1091-1094 (1981), but that opinion is careful to distinguish the issues there treated from those involved here, principally upon the ground that those contentions do "not fit with this (*Bebchick* case) which is not primarily concerned with improperly increased fares." 207 U.S. App. D.C. at 167, 645 F.2d at 1091. That case quite properly analogized the issue of interest to its

Had in-service appreciation of removed properties been passed on to farepayers when Order 773 was entered in 1968 as *DCC I* requires, it would have resulted in a tax deduction to D.C. Transit for the amount of the net revenue reduction the Commission would have been obliged to order. That tax deduction, net of capital gains liabilities, should have been passed on to the farepayers who bore the burden of Transit's income tax expenses in Order 773 and in all previous and subsequent rate orders. Having borne the burden of income tax expense, the farepayers are entitled to the benefit of income tax savings.

Tax savings incident to a net revenue reduction or refund belong to the farepayers:

> (T)here is no statutory authority for the commission to treat actual savings in taxes...any differently than savings in any other cost of service. It is the obligation of all regulated public utilities to operate with all reasonable economies. This applies to tax savings as well as economies of management. The net result of this, of course, is that such savings as are effected are passed on to the consuming public. This we consider to be the natural and necessary consequence of rate regulation.[6]

Had the Commission given proper and timely recognition to the farepayers' entitlement to in-service appreciation, it would have ordered a refund, lowered cash fares, or in any event not increased them. Any of these actions would have yielded lower taxable income until the in-service appreciation entitlement was exhausted. Just as the Commission charges the farepayers with

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allowance in a "taking" case under the Fifth Amendment. 207 U.S. App. D.C. at 169, 645 F.2d at 1904, and that analogy is equally applicable to the "taking" that occurred when D.C Transit withdrew the subject properties from public service. As in "just compensation" cases, the victim is not made whole unless he is placed in as good a position as he would have been had that been done which ought to have been done.

[6] Panhandle Eastern Pipe Line Company v. Federal Power Commission, 113 U.S. App. D.C. 94, 97, 305 F.2d 763, 766, *cert. denied,* 372 U.S. 916 (1963), quoting the Fifth Circuit in El Paso Natural Gas Co. v. Federal Power Commission, 281 F.2d 567, 573 (5th Cir. 1960). *See also* the discussion of investment tax credits in Williams v. WMATC, 134 U.S. App. D.C. 342, 378-383, 415 F.2d 922, 958-963 (1968), where both *El Paso* and *Panhandle* are cited in footnote 235. 134 U.S. App. D.C. at 382, 415 F.2d at 962.

the increased income tax expense incident to a fare increase, so it should credit the farepayers with the tax savings incident to a refund or reduction in net revenues.

Commissioner Stratton in his Hearing Officer's Report (A118) states:

> So, if the result required by *DCC I* had been reached in the first instance, I believe the Commission would have scheduled amortization of the credit over some reasonable period of time—say at the rate of $972,000 per year...On that basis, some $738,720...would have been amortized while Order No. 773 was in effect, and the balance, or most of it, would have been amortized during Transit's remaining life as a public utility—the principle having been established.

Why, therefore, should restitution result in anything less than recognizing the principle when it should have been?

CONCLUSION

For the reasons set forth above, the cross petition for a writ of certiorari should be granted.

Respectfully submitted.

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Democratic Central Committee
of the District of Columbia, et al.

December 23, 1988